Appeal No. SC85756

IN THE
MISSOURI SUPREME COURT

BETH ANN SCHWAN,
Appellant,

v.

USAA CASUALTY INSURANCE COMPANY,
Respondent,

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT
HONORABLE ROBERT S. COHEN, JUDGE, DIVISION 1

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the Honorable Robert S. Cohen sitting in Division 1 of the Twenty First Judicial Circuit, St. Louis County, pursuant to a jury verdict, in favor of Respondent USAA Casualty Insurance Company and against Appellant Beth Ann Schwan.

As the issues do not involve any of those falling under the exclusive jurisdiction of the Supreme Court, this appeal was originally filed with the Court of Appeals for the Eastern District of Missouri pursuant to Article V, § 3 of the Missouri Constitution.

On October 28, 2003, the Court of Appeals for the Eastern District of Missouri issued its order affirming the judgment of the trial court. Appellant made a timely application for transfer to the Missouri Supreme Court was timely made pursuant to Missouri Supreme Court Rule 83.02. The Court of Appeals denied that motion on November 12, 2003. Appellant then made a timely application for transfer to the Missouri Supreme Court pursuant to Missouri Supreme Court Rule 83.03. As grounds for transfer, Appellant's application asserted the questions involved in this case are of general interest and importance and because the opinion of the Court of Appeals below is contrary to the decisions of the appellate courts of Missouri. This Court granted Appellant's application for transfer on January 27, 2004.

STATEMENT OF FACTS

A fire at 801 Lincoln in Elsberry, Missouri on January 20, 1998, destroyed the dwelling and personal property of the Appellant, her husband, Kurt Schwan, and their minor children (Jenna (13), Christopher (12), Andrew (9), and Kitty (7)), (L.F. 7, 155). Appellant and her husband owned the property, including the dwelling and the contents. (L.F. 6). The family pets, a Dalmatian (Maggie) and their two cats (Vixen and Winnie), perished in the fire. (T. 121, 164-65). Appellant testified her daughter received one of the cats as a Christmas gift. Kurt took a particular liking to the Dalmatian and often took her to work with him at Hill Behan Lumber. (T. 124-5, 164-65).

On the date of the fire, Appellant did not reside at the residence. In October 1997, Appellant and her minor children moved out of the Elsberry residence and into her parents's home in St. Louis County. (L.F. 47; T. 157). Kurt Schwan continued to live at the residence in Elsberry, along with the family pets. (T. 155). Mr. Schwan was at work when the fire began. (T. 124-25).

Appellant testified that "[w]e planned on selling at some time. It was … a wonderful place to raise kids … But I was thinking, and I know Kurt said the same thing, that as the kid [sic] got older it really wasn't the place we wanted to raise the kids, say when they got to be twelve, thirteen, fourteen years old…." (T. 159). At the time of the fire, the Schwans's oldest child was nine (the three others were 8, 5, and 3). (T. 155). Trial testimony was adduced that Appellant and her husband planned to sell the home at some point in the future after the home was

fully rehabilitated. (T. 119, 137, 159). The home was not rehabilitated at the time of the fire. (T. 117).

On May 5, 1997, in consideration of a premium paid in full to Respondent USAA Casualty Insurance Company, Respondent issued an insurance policy, for a period commencing July 2, 1997, and ending July 2, 1998. The policy insured the dwelling against damage or destruction by fire in an amount up to and including one hundred thousand dollars ($100,000); personal property against damage or destruction by fire in the amount up to and including seventy five thousand dollars ($75,000); and loss and use of the property in an amount up to and including twenty thousand dollars ($20,000). (L.F. 6-7).

On the morning after the fire, Marty Merkau, an adjuster for USAA, arrived at the property. (T. 171). Later that day, Michael Schlatman, an investigator independently retained by USAA to investigate the fire, arrived and began an investigation of the fire and the fire scene. (T. 171, 277-78, 289-90). Appellant testified that Mr. Schlatman and other representatives interrogated Kurt Schwan for hours and immediately asserted that Kurt Schwan had set the fire. (T. 172).

On January 23, 1998, Respondent, by its agent, Marty Merkau, sent a letter to Appellant stating that the insurance policy in effect on the house may not provide coverage since Kurt Schwan may have intentionally caused the fire. (T. 173-74). However, Respondent still required Appellant to complete a room-by-room inventory of the contents lost in the fire. Respondent refused to grant Appellant an extension to complete the inventory, thereby forcing her to drop the

classes required to complete her teaching degree in order for her to timely meet Respondent's deadline. (T. 180-81).

On March 23, 1998, Appellant timely submitted a sworn statement in proof of loss to Respondent in accordance with Respondent's policy. (L.F. 7). On June 9, 1998, Respondent denied coverage under the policy and refused to make full payment to Appellant for the property lost due to the fire. (L.F. 7)

On June 7, 1999, Appellant filed suit in St. Louis City Circuit Court against USAA Casualty Insurance Company and Kurt Schwan. Appellant alleged that Respondent USAA refused to honor its insurance policy and vexatiously refused to pay its policy. Appellant alleged that Kurt Schwan was negligent, and that his negligence caused the fire that completely destroyed the personal property of the Appellant and her children. (L.F. 42-45). Kurt Schwan requested that Respondent defend him in the suit filed by Appellant. Respondent denied this request. (L.F. 52-56). Without legal representation, Kurt Schwan failed to respond to Appellant's Petition, resulting in Appellant filing a Motion for Entry of Default Judgment against Defendant Kurt Schwan, to determine the issue of negligence. (L.F. 57-58). Notice of Appellant's intent to seek default judgment against Kurt Schwan was sent to counsel for USAA. (L.F. 62-63). Counsel for USAA requested that it not be included on Appellant's certificate of service regarding her motion because USAA claimed it was no longer a party to the suit. (L.F. 64). The Court entered default judgment against Kurt Schwan, via court order entered September 1, 2000. (L.F. 65-67). In its three page Judgment by Default, the

Court determined that Kurt Schwan's negligence was the cause of the fire that destroyed the Elsberry residence. (L.F. 66). The Court found Kurt Schwan was negligent and as a direct and proximate cause of Kurt Schwan's negligence, the residence and personal property of Appellant and her minor children were destroyed by fire. (L.F. 65-67). The Court entered judgment in favor of Appellant in the amount of $150,000. (L.F. 65-67).

On December 11, 2001, Appellant filed a two-count Petition in St. Louis County Circuit Court, alleging that Respondent breached the insurance contract entered into between the parties, and that Respondent vexatiously refused to honor its policy. (L.F. 6-8).

Before trial, Appellant moved for directed verdict on the issue of Kurt Schwan's intent in relation to the fire arguing that the St. Louis City Court's judgment settled that issue. (T. 12-14). The trial court judge denied the motion and allowed Respondent to present a defense that Kurt Schwan intentionally set the fire to the residence. (T. 12-14).

The trial court granted one of Appellant's motions in limine and ruled that while Respondent's counsel could introduce evidence of prior fires that involved Kurt Schwan, there could be no reference to Mr. Schwan's Suspended Imposition of Sentence imposed after a guilty plea in 1982 to the class D felony of arson. (T. 7-8).

In his opening statement, counsel for Respondent stated, "Kurt Schwan has a past history of arson." (T. 46). Counsel for Appellant promptly objected and

requested a mistrial based on the court's previous ruling that there could be no mention of Kurt Schwan's previous criminal case, plea or resultant suspended imposition of sentence. (T.46). The trial court overruled Appellant's objection and request for mistrial. (T. 46). However, the Court specifically ordered that the word "arson" not to be used for the remainder of the trial. (T. 47). Despite this ruling, Respondent's counsel continued to use the word "arson":

> "And this is one of the classic motives, classic indicators that investigators look for in **arson** fires. And it sounds like this isn't really going to be disputed." (T. 53).
>
> "What evidence is that of **arson**, or of someone intentionally setting the fire, if the house was going to burn down the same exact way it did if the fire was accidental in origin?" (T. 365)
>
> "This order of protection that Mrs. Schwan filed within a week of this fire. On January 20, 1998, our house burned to the ground. The fire is under investigation. The fire was deliberately set. And he is under investigation. He has a mental illness, and he is not currently taking his medication. He has a drinking and a gambling problem and a past history of **arson**. I'm afraid. I don't know what he's going to do next. Her words, within one week of this fire. This is in evidence. You can ask for it if you want to look at it when you're back in the jury room. Her words." (T. 392)
>
> "**Arson -- arson** is a very serious thing." (T. 396)

"**Arson** should not be taken lightly. And we all have a duty. We cannot reward this kind of behavior. We just can't." (T. 397.)

At trial, Appellant introduced the testimony of Ronald Gronemeyer, an independent fire investigator and former firefighter and fire investigator with the City of St. Louis for thirty-three years. (T. 64, 68). Mr. Gronemeyer testified that after reviewing photographs, documents, reports and depositions of other investigators present at the scene, he concluded that due to the extensive damage to the residence, he could not determine the cause or the origin of the fire within any degree of certainty. (T. 103).

Kurt Schwan also testified that he had been involved in an incident with a fire fifteen years previously in which he threw a lit cigarette into the back of a closet in his apartment in Columbia, Missouri, which resulted in a fire in the closet. (T. 115). He stated: "I threw a cigarette against the back of a closet and just left." (T. 115). The only evidence of damage was that there was a fire in the closet. (T. 115). Kurt Schwan also testified that he did <u>not</u> set the fire that destroyed the Elsberry residence. (T. 127). Furthermore, Kurt Schwan specifically testified that he "didn't set <u>any</u> fire." (T. 130). (Emphasis added.)

Appellant also testified that she and Kurt Schwan separated in October, 1997, and she was not residing in the Elsberry residence at the time of the fire. (T. 155). On cross-examination, counsel for Respondent introduced Defense Exhibit "A", a copy of an order of protection filed by Beth Schwan on January 27, 1998, in the Circuit Court of St. Louis County, Missouri. (L.F. 74-80; T. 209). Defense

Exhibit "A" included a written statement by Appellant: "he (Kurt Schwan) has a history of arson." (L.F. 78). This statement was presented to the jury over the objection of Appellant's counsel based on the fact that the statement was inadmissible and prejudicial. (T. 210-11). Moreover, Appellant testified that she obtained the order of protection because "[g]iven all the emotional upheaval that was going on in our lives, and the fact that the insurance company—or Michael Schlatman was making the accusations that Kurt had started the fire, that I could go ahead and do the order of protection." (T. 176).

In his closing argument, Respondent's counsel stated to the jury that "Kurt Schwan set his apartment on fire and burned his apartment down..." Appellant's counsel immediately objected that these statements were outside the evidence in the case. (T. 389). Respondent's counsel stated during closing argument that "it's hard for me to stand up here, you know, when I feel -- you know, every once in a while, you know, most of the time it's the person that actually lit the match. And I don't have any sympathy for a person like that. But when it's a person like Mrs. Schwan, sometimes it's hard for me to even stand up here and say these things to you." (L.F. 396).

After a three-day jury trial, the jury returned a verdict in favor of Respondent and against Appellant. (L.F. 68)

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN OVERULLING APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND/OR FOR A NEW TRIAL, BECAUSE THE VERDICT IS AGAINST THE LAW UNDER THE EVIDENCE IN THAT APPELLANT IS AN INNOCENT CO-INSURED.

Amick v. State Farm Fire & Casualty Co., 832 F.2d 704 (E.D. Mo. 1998)

American Hardware Mutual Insurance Co. v. Mitchell, 870 S.W.2d 783 Ky. 1993)

Haynes v. Hanover Insurance Companies, 783 F.2d 136 (E.D. Mo. 1986)

Employers Mutual Casualty Co. v. Taverno, 4 F. Supp.2d 868 (E.D. Mo. 1998)

II. THE TRIAL COURT ERRED IN OVERULLING APPELANT'S OBJECTION AND MOTION FOR A MISTRIAL AND ALLOWING RESPONDENT'S COUNSEL TO REFER TO KURT SCHWAN AS AN ARSONIST AND USING THE TERM ARSON WITH RESPECT TO MR. SCHWAN AFTER HAVING RULED THAT HIS SUSPENDED IMPOSITION OF SENTENCE WAS INADMISSIBLE AND PROHIBITING THE TERM ARSON FROM BEING USED IN THAT THE JURY COULD EASILY INFER BY THESE STATEMENTS THAT KURT SCHAWN HAS PRIOR CRIMINAL HISTORY RELATED TO ARSON.

Yale v. City of Independence, 846 S.W. 2d 839 (Mo. banc 1993)

M.A.B. v. Nicely, 909 S.W. 2d 669(Mo. banc 1995)

Section 491.050 RSMo

Sections 569.040, 569.050, 569.060, 569.065 RSMo

The American Heritage Dictionary of the English Language: Fourth Edition, 2000

Encyclopedia Brittanica, 2003

III. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT BECAUSE KURT SCHWAN'S INTENT IN RELATION TO THE FIRE HAD ALREADY BEEN ESTABLISHED IN PRIOR LITIGATION, IN THAT RELITIGATION OF THIS ISSUE WAS BARRED BY COLLATERAL ESTOPPELL.

Lodigensky v. American States Preferred Insurance Co., 898 S.W.2d 661 (Mo. App. W.D. 1995)

Neurological Medicine, Inc. v. General American Life Ins. Co., 921 S.W.2d 64 (Mo. App. E.D. 1996)

Cox v. Steck , 922 S.W.2d 221 (Mo. App. E.D. 1999)

Drennen v. Wren, 416 S.W.2d 229 (Mo. App. 1967)

ARGUMENT

I. THE TRIAL COURT ERRED IN OVERULLING APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND/OR FOR A NEW TRIAL, BECAUSE THE VERDICT IS AGAINST THE LAW UNDER THE EVIDENCE IN THAT APPELLANT IS AN INNOCENT CO-INSURED.

The parties agree that Appellant Beth Schwan had no involvement in starting the fire that destroyed her and her children's real and personal property and took the lives of her family's three pets. In fact, Respondent's counsel stated during closing argument that "it's hard for me to stand up here, you know, when I feel -- you know, every once in a while, you know, most of the time it's the person that actually lit the match. And I don't have any sympathy for a person like that. But when it's a person like Mrs. Schwan, sometimes it's hard for me to even stand up here and say these things to you." (L.F. 396).

The standard of review in determining whether the trial court erred in ruling on a judgment notwithstanding the verdict on purely legal issues is de novo. Fabricor, Inc. v. E.I. DuPont De NeMours & Co., 24 S.W.3d 82, 93 (Mo. App., W.D. 2000).

The Missouri Supreme Court has never directly dealt with the doctrine of an "innocent co-insured." See, e.g., Employers Mutual Casualty Co. v. Taverno, 4 F. Supp.2d 868, 870 (E.D. Mo. 1998). The Missouri Court of Appeals for the

Eastern District ruled that the language of an insurance policy that unambiguously declared that the appellant's rights were jointly held with the co-insured and therefore, their rights depended on the conduct of the co-insured. Childers v. State Farm Fire and Casualty Company, 799 S.W.2d 138, 141 (Mo. App. E.D. 1990). Appellant's insurance policy sets forth an exclusion for intentional loss "arising out of any act committed:

a. by or at the direction of an insured; or

b. with the intent to cause a loss." (L.F. 40).

In opening statement, counsel for Appellant stated that this is how the policy reads. (T. 26). There is no argument over what words are written in the policy. However, Appellant argues that the language is ambiguous and how the words read is subject to more than one interpretation. Appellant also asserts that the insurance policy is contrary to public policy.

The insurance policy in this case makes no reference to voidability in the based on the actions of other insureds. When the United States Court of Appeals for the Eastern District of Missouri reviewed this issue under Missouri law, it determined that "the key factor is whether the policy provision barring recovery by innocent co-insureds is clear and unambiguous." Amick v. State Farm Fire and Casualty Company, 832 F.2d 704, 706 (E.D.Mo. 1998). The Amick Court examined the policy and determined that it "unambiguously denied recovery to 'you and any other insured' in the event 'you or any other insured' commit fraud or misrepresent material facts." Id. Clearly, Appellant's insurance policy makes

no reference to the actions of any other insureds. Appellant asserts that under her policy she could not recover for her wrongful actions, which is consistent with the language used in the insurance policy. However, there is no evidence or dispute that Appellant engaged in any action to cause an intentional loss and thus void the policy with respect to her. The language of the policy would however, operate to bar her husband, Kurt Schwan, from recovering under the policy as he is the only insured who possibly acted in such a manner as to void the contract. In contrast, Appellant under the language of the policy, should be entitled to recover as she is an innocent co-insured.

In Haynes v. Hanover Insurance Companies, 783 F.2d 136, 138 (E.D.Mo. 1986) the court stated that there is a split on the question of innocent co-insured recovery, but that they favored a view that Missouri should allow an innocent co-insured to recover, absent contract provisions to the contrary. This position was based on the theory that a rule imputing the wrongful acts of one insured to a co-insured spouse merely because of the marital relationship is outdated and unduly harsh. Id. Such is the situation in the case at hand.

The more recent trend in jurisdictions throughout the country is to allow the innocent co-insured full or partial recovery in spite of a contradictory adhesive contractual provision. The Supreme Court of Kentucky has accepted the doctrine of "innocent co-insured" in American Hardware Mutual Insurance Co. v. Mitchell, 870 S.W.2d 783 (Ky. 1993). In articulating its policy, the Kentucky Supreme Court ruled that a wife and husband are individually responsible for their own

separate acts, and that the proper rule should be that an innocent spouse should not be denied coverage under a policy of insurance simply because of the marital relationship. Id. at 785. The court further stated that since insurance policies are contracts of adhesion, and interpreted most strongly against the party preparing same, the policy could have been written to negate the collection of the uninsured, and should be considered several or separate as to each person insured. Id. Other states, in more recent decisions, have followed this line of reasoning. *See* e.g., Fittje v. Calhoun Cty. Mut. Fire Ins., 552 N.E.2d 353 (Ill. App. 4 Dist. 1990); Brown v. Frankenmuth Mutual Insurance Co., 468 N.W.2d 243 (Mich. App. 1991); Texas Farmers Ins. Co. v. Murphy, 996 S.W.2d 873 (Tex. 1999).

While there is no bright line rule in Missouri on the innocent co-insured doctrine, this Court should follow the progression of cases cited above and reverse the trial court's error of overruling Appellant's motion for judgment notwithstanding the verdict, or for a new trial, in that the verdict is against the law under the evidence and because Appellant is an innocent co-insured and should not be barred from recovery.

II. THE TRIAL COURT ERRED IN OVERULLING APPELANT'S OBJECTION AND MOTION FOR A MISTRIAL AND ALLOWING RESPONDENT'S COUNSEL TO REFER TO KURT SCHWAN AS AN ARSONIST AND USING THE TERM ARSON WITH RESPECT TO MR. SCHWAN AFTER HAVING RULED THAT HIS SUSPENDED IMPOSITION OF SENTENCE WAS INADMISSIBLE AND PROHIBITING THE TERM ARSON FROM BEING USED IN THAT THE JURY COULD EASILY INFER BY THESE STATEMENTS THAT KURT SCHAWN HAS PRIOR CRIMINAL HISTORY RELATED TO ARSON.

On numerous occasions, Respondent's counsel violated the trial court's pre-trial ruling that no reference to Kurt Schwan's criminal past of his suspended imposition of sentence would be allowed and the court's later ruling that Respondent not use the word "arson" throughout the trial.

The standard of review for a claim of error in admitting evidence is abuse of discretion. Miller v. Neill, 867 S.W.2d 523, 528 (Mo. App., E.D. 1993). The trial court abused its discretion by allowing Respondent to make repeated references to Kurt Schwan's history of "arson."

In opening statement, Respondent's counsel referred to Kurt Schwan's criminal history, consisting of a suspended imposition of sentence arising from a guilty plea to the charge of arson in 1982 when he stated, "Kurt Schwan has a past history of arson." (T. 46). Again, during his cross examination of Appellant,

counsel for Respondent introduced Defense Exhibit "A", a copy of an order of protection filed by Beth Schwan on January 27, 1998, in the Circuit Court of St. Louis County Missouri. (L.F. 74-80, T. 209). A statement in Defense Exhibit "A" that "he (Kurt Schwan) has a history of arson" was heard by the jury over Appellant's objection. In both instances, counsel for Appellant promptly objected; however the trial court overruled the objections. Respondent's counsel flagrantly ignored the court's order and continued to use the term throughout trial.

Section 491.050 RSMo addresses the permissible use of a witness's criminal history in subsequent judicial matters. The use of a prior "conviction" is permitted for impeachment purposes in a civil matter. Section 491.050 RSMo. While the use of a prior plea of guilty would be permissible in a criminal case; it is not permitted for impeachment in a civil matter. Section 491.050 RSMo. The Missouri Supreme Court has clearly stated that the word "conviction" does not include a disposition of a suspended imposition of sentence. Yale v. City of Independence, 846 S.W.2d 193, 196 (Mo.Banc. 1993). The Missouri Supreme Court further examined the statute and upheld the distinction made by the legislature in § 491.050 RSMo by ruling that a witness in a civil case cannot be impeached by a suspended imposition of sentence. M.A.B. v. Nicely, 909 S.W.2d 669, (Mo.Banc. 1995).

The trial court specifically declared that the word "arson" was not to be used for the remainder of the trial. (T. 47). Despite this, Respondent's use of the

word in opening statement was not an isolated incident and counsel continued to use the word “arson” five more times throughout trial:

> “And this is one of the classic motives, classic indicators that investigators look for in **arson** fires. And it sounds like this isn't really going to be disputed.” (T. 53).
>
> “What evidence is that of **arson**, or of someone intentionally setting the fire, if the house was going to burn down the same exact way it did if the fire was accidental in origin?” (T. 365).
>
> “This order of protection that Mrs. Schwan filed within a week of this fire. On January 20, 1998, our house burned to the ground. The fire is under investigation. The fire was deliberately set. And he is under investigation. He has a mental illness, and he is not currently taking his medication. He has a drinking and a gambling problem and a past history of **arson**. I'm afraid. I don't know what he's going to do next. Her words, within one week of this fire. This is in evidence. You can ask for it if you want to look at it when you're back in the jury room. Her words.” (T. 392).
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> “**Arson -- arson** is a very serious thing.” (T. 396).
>
> “**Arson** should not be taken lightly. And we all have a duty. We cannot reward this kind of behavior. We just can't.” (T. 397).

Arson is a criminal charge, and is generally understood to be a criminal charge by laypersons. The reference to an individual’s “history of arson” is a

reference to a criminal past inasmuch as a "history of stealing" would reference a criminal past.

American Heritage Dictionary defines Arson as: The *crime* of maliciously, voluntarily, and willfully setting fire to the building, buildings, or other property of another or of burning one's own property for an improper purpose, as to collect insurance. The American Heritage Dictionary of the English Language: Fourth Edition, 2000. Encyclopedia Britannica defines Arson as: *Crime* of willfully, wrongfully, and unjustifiably setting property on fire, often for the purpose of committing fraud (e.g., on an insurance company). These both reflect that the term arson is used as a criminal term, and has a criminal connotation associated with it**.** Encyclopedia Britannica, 2003. Furthermore, both of Missouri's arson statutes define the crime of arson as having a "knowing" element with respect to the fire. *See* §§ 569.040 and 569.050 RSMo. This is in contrast to the lesser crimes of recklessly or negligently burning or exploding. *See* §§ 569.060 and 569.065 RSMo. Kurt Schwan maintained throughout trial that he did not knowingly, or intentionally, start the fire of the home owned by he and Appellant.

While the trial court allowed evidence of a prior fire that Kurt Schwan was associated with, it specifically forbade Respondent's counsel to go into prior criminal charges, or the disposition of criminal charges against him. (T. 7-8). The evidence presented at trial as to the extent of the prior fire was that it was an accidental fire that occurred in a closet in an apartment possessed by Kurt Schwan.

There was no evidence presented of arson, or a history of arson as defined either by Missouri Statute or by common usage definitions as referenced above.

The term "history of arson" was a clear reference to Kurt Schwan's criminal history and resultant suspended imposition of sentence, and a violation of the law against evidence of dispositions of a suspended imposition of sentence under M.A.B. v. Nicely, 909 S.W.2d 669 (Mo. banc 1995).

Appellant was clearly prejudiced by this improper evidence, as it painted Kurt Schwan in a criminal light, as an arsonist, as someone who maliciously and voluntarily sets property on fire, thusly implying a criminal history for the crime of arson. This is especially prejudicial in the context of this case. The issues at trial were whether Appellant could recover under the insurance policy for damage caused by a fire that Respondent had concluded was intentionally set by her husband, Kurt Schwan. Respondent argued that if either Appellant or her husband intentionally caused the fire, Appellant was not entitled to recover under the policy. Setting aside for a moment the arguments espoused by Appellant in Arguments I and III of her brief, clearly a history of arson, with its criminal connotations, would be prejudicial to a jury responsible for determining if this fire was intentionally caused. For these reasons, this Court must reverse the trial court ruling on this point and grant Appellant a new trial.

III. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT BECAUSE KURT SCHWAN'S INTENT IN RELATION TO THE FIRE HAD ALREADY BEEN ESTABLISHED IN PRIOR LITIGATION, IN THAT RELITIGATION OF THIS ISSUE WAS BARRED BY COLLATERAL ESTOPPELL.

The issue of whether Kurt Schwan intentionally set the fire was previously litigated, with a final judgment that Kurt Schwan did not intentionally set the fire in this case. The trial court erred in denying Appellant's motion for directed verdict on this issue and allowing Respondent to argue throughout the trial that Kurt Schwan intentionally set fire to the residence.

The standard of review on this issue is de novo. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993).

Collateral estoppel precludes the same parties, or those in privity with those parties, from relitigating issues that have already been litigated. Hangley v. American Family Mut. Ins. Co., 872 S.W.2d 544, 547 (Mo. App. W.D. 1994). Appellant's Petition filed in the City of St. Louis raised two claims. First, Appellant claimed that Respondent USAA breached the contract of insurance with Appellant, and Respondent's refusal to honor the insurance contract without justification constituted vexatious refusal to pay, pursuant to § 508.010 RSMo. (L.F. 42-49). Second, Appellant claimed that the fire which destroyed her

dwelling and personal possessions was the result of Kurt Schwan's negligence. (L.F. 42-49).

The issue of Kurt Schwan's negligence was thus determined by the Court in its default judgment, entered on September 1, 2000. (L.F. 65-67). Respondent was a party to that action, and had an opportunity to argue its position during the hearing on Appellant's Motion for Entry of Default Judgment. (L.F. 63). However, Respondent declined to participate in the hearing on Appellant's Motion for Entry of Default Judgment, or present any evidence at this hearing. The doctrine of collateral estoppel should have precluded Respondent from asserting at the trial in this case that it is not bound by the City of St. Louis Court's ruling of September 1, 2000, finding that Kurt Schwan negligently caused the fire. Land Clearance for Redevelopment Authority of City of St. Louis v. United States Steel, 911 S.W.2d 685 (Mo. App. E.D. 1995). The trial court improperly allowed Respondent to re-litigate the issue of Kurt Schwan's culpability in this fire. There was already a binding final judicial determination that Kurt Schwan negligently, not intentionally, caused the fire. Moreover, Respondent's failure to defend Kurt Schwan resulted in Respondent's forfeiture of any right to subsequently litigate the issue of Kurt Schwan's liability. Lodigensky v. American States Preferred Insurance Co., 898 S.W.2d 661 (Mo. App. W.D. 1995).

Respondent was thus collaterally estopped from asserting that the fire that destroyed the dwelling located at 801 Lincoln, Elsberry, Missouri was intentionally set. The application of collateral estoppel is proper if the following

four factors are satisfied: (1) the issue in the present case is identical to the issue decided in a prior case; (2) there was a judgment on the merits in the prior adjudication; (3) the party against whom collateral estoppel is asserted is the same party or in privity with a party in the prior adjudication; and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit. Neurological Medicine, Inc. v. General American Life Ins. Co., 921 S.W.2d 64, 68 (Mo. App. E.D. 1996).

The first factor is clearly satisfied. Respondent's sole defense before the trial court was that Kurt Schwan intentionally set the fire on January 20, 1998, and the insurance policy in question specifically precludes coverage for intentional acts. (L.F. 394-96). The issue addressed in the default judgment hearing was whether the fire in question was the result of negligent or intentional acts. The Court considered the issue and the evidence, and found that it was Kurt Schwan's negligent behavior that caused the fire. (L.F. 65-67). Respondent was a party to that action. Respondent was served with a copy of Appellant's motion for entry of default judgment against Kurt Schwan, and received notice of the hearing on the motion. (L.F. 57-58, 63). Respondent also had the opportunity to present evidence in support of its theory that the fire was intentionally set, but failed to do so. Whether Kurt Schwan acted intentionally or negligently was at issue in Appellant's first action. The Court decided this issue. (L.F. 65-67). Respondent was improperly allowed to re-litigate the issue of Kurt Schwan's negligence in the underlying trial. Respondent was estopped from re-arguing this same issue. The

trial court erred in allowing Respondent to argue the issue of negligence, given that the issue had already been judicially decided.

The second factor is also satisfied. The default judgment was entered after all parties, including Respondent, were given notice of the hearing, and provided an opportunity to present evidence. Appellant presented evidence to the Court demonstrating that Kurt Schwan was negligent, and his negligence resulted in the fire in question. Respondent failed to appear in court to present contrary evidence or argue that Kurt Schwan acted intentionally. The evidence before the Court demonstrated that Kurt Schwan was in sole possession of the dwelling at the time of the fire. (L.F. 65-67). The evidence also demonstrated that Kurt Schwan failed to have the furnace professionally serviced, even after he learned that it was not functioning properly. (L.F. 65-67). The evidence demonstrated that Kurt Schwan attempted to repair the malfunctioning furnace without proper training. (L.F. 65-67). The evidence also demonstrated that Kurt Schwan stored flammable solvents and other chemicals near the furnace. (L.F. 65-67). The Court determined that these acts were negligent and resulted in the complete destruction of the dwelling by fire. (L.F. 65-67). Appellant also presented evidence supporting her claim for damages, which included numerous inventories reflecting the personal property destroyed in the fire. (L.F. 65-67). The Court found that Appellant suffered damages in the amount of $150,000. (L.F. 65-67). The Court, based upon the evidence before it, determined that Kurt Schwan acted negligently, his negligence was the cause of the fire that destroyed Appellant's dwelling and personal

property, and that Appellant incurred damage in the amount of $150,000. (L.F. 65-67).

The third element of collateral estoppel is also satisfied. Respondent was a party to the first action. (L.F. 42-49). Respondent was served with Appellant's motion, and received notice of Appellant's hearing regarding entry of default judgment against Kurt Schwan. (L.F. 57-58, 63). Both Respondent and Kurt Schwan had an interest in presenting evidence to the Court that the fire of January 20 was not the result of Kurt Schwan's negligence, but the result of some other act or source. Both Respondent and Kurt Schwan would benefit if the evidence demonstrated that Appellant's allegations of negligence were unsupported by the evidence. If the evidence did not support Appellant's allegation of negligence on the part of Kurt Schwan, Appellant's action against both Respondent and Kurt Schwan would be groundless. However, Respondent knowingly and purposefully declined to participate in the hearing on Appellant's motion. (L.F. 64). Although it had a vested interest in the outcome of this hearing, Respondent did not participate. Respondent was both a party, and had a vested interest in demonstrating that Kurt Schwan did not negligently cause the fire of January 20, 1998.

Finally, Respondent had a full and fair opportunity to litigate that matter of Kurt Schwan's negligence, but purposely failed to do so, thus satisfying the fourth element of the collateral estoppel test. Respondent was served with a copy of Appellant's Motion for Entry of Default Judgment, and given notice of

Appellant's intent to proceed with the entry of default judgment against Kurt Schwan. (L.F. 57-58, 63). Respondent made a strategic decision not to participate in the hearing, and even went so far as to request that Appellant no longer give Respondent notice of her hearing on her motion for default judgment. (L.F. 64). Respondent had the opportunity to litigate the issue of Kurt Schwan's negligence, but chose not to do so.

The issue of Kurt Schwan's negligence was thus decided prior to trial. The St. Louis Circuit Court found that Kurt Schwan acted negligently, and his negligence directly caused the fire that destroyed Appellant's dwelling and personal property on January 20, 1998. (L.F. 65-67). Respondent failed to participate at all in the hearing on the issue of negligence. The doctrine of collateral is designed estoppel to relieve the parties of the cost and vexation of duplicative litigation, to conserve judicial resources, and to encourage reliance on adjudication by avoiding inconsistent decisions. Missouri Insurance Guaranty Association v. Wal-Mart Stores, Inc., 811 S.W.2d 28, 32 (Mo. App., E.D.1991). By allowing Respondent to relitigate the issue of whether Kurt Schwan intentionally set this fire, the trial court ignored and abandoned the purposes of the collateral estoppel doctrine. The trial court thus erred and this Court should vacate the judgment for Respondent.

Moreover, Respondent was estopped from arguing that it was not bound by the judgment entered against Kurt Schwan based upon the "inherent conflict" theory advanced in Cox v. Steck, 992 S.W.2d 221 (Mo. App. E.D. 1999).

Generally, and as a matter of public policy, if an insurer refuses to defend an insured, after being given the opportunity to provide a defense, the insurer forfeits the right to participate in litigating the insured's liability, and is bound by any judgment against the insured. Lodigensky v. American States Preferred Insurance Co., 898 S.W.2d 661, 664 (Mo. App. W.D. 1995). The language of the insurance policy and the allegations in the petition governs whether an insurer is obligated to defend an insured. Scottsdale Ins. Co. v. Ratliff, 927 S.W.2d 531, 532 (Mo. App., E.D. 1996). Appellant's Petition alleged that Kurt Schwan was negligent and that his negligence caused the fire that destroyed her dwelling and personal property contained therein. (L.F. 42-49). Given these allegations, Respondent, by the terms of the insurance policy in place, was bound to provide Kurt Schwan with a defense. The insurance policy specifically provides:

> "if a claim is made or a suit is brought against an insured for damages because of bodily injury or property damages caused by an occurrence to which this coverage applies, we will:
>
> 1. pay up to our limit of liability for the damages for which the insured is legally liable; and
>
> 2. provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent." (L.F. 36)

Where the insurer is bound to protect another from liability, and fails to do so, it is bound by the result of the litigation to which the insured is a party, if the insurer had the opportunity to control and manage the prior litigation. Drennen v.

Wren, 416 S.W.2d 229, 234 (Mo. App., Spring. D. 1967). Pursuant to this clause of the insurance policy in question, Kurt Schwan requested that Respondent defend him in Appellant's action, but Respondent refused. (L.F. 52-56). Respondent was obligated to protect Kurt Schwan and had the opportunity to control and manage the action against Kurt Schwan. Respondent's refusal to participate in the action against Kurt Schwan binds Respondent to the judgment entered against Kurt Schwan. Id.

An exception to the general principle stated above is recognized in Missouri. If an insurer refuses to defend an insured due to an inherent conflict of interest with the insured, the insurer will not be bound by a judgment entered against the insured. Cox, supra. Such a conflict exists if the theory upon which an insured is denying coverage is in direct conflict with the theory to be advanced by the insured in the litigation at issue. Id. However, in the case at hand, the theory to be advanced by Kurt Schwan in Appellant's action against him was not inherently in conflict with any theory relied upon by Respondent in denying coverage to Kurt Schwan.

The decision of an insurer to refuse to provide a defense to an insured is attendant with risk, and the insurer bears the risk of the consequences of refusing to defend an insured under a valid policy of insurance. Whitehead v. Lakeside Hosp. Assn., 844 S.W.2d 475, 480 (Mo. App., W.D. 1992). Respondent's failure to defend Kurt Schwan subjected it to the risk of being bound by any judgment against Kurt Schwan. Respondent opted to assume this risk, and is subject to the

consequences of that decision. The trial court erred by allowing Respondent to re-litigate Kurt Schwan's intent in its defense to Appellant's claims.

Respondent's decision not to participate in the hearing on Appellant's motion for entry of default judgment prohibited Respondent from arguing at this trial that Kurt Schwan intentionally set the fire in question. The trial court erred in denying Appellant's motion for directed verdict and by allowing Respondent to raise the defense that Kurt Schwan intentionally set the subject fire.

CONCLUSION

For the foregoing reasons in Point III, Appellant requests this action be reversed and judgment be entered on behalf of Appellant Beth Schwan. For the foregoing reasons in Points I and II, Appellant requests this action be reversed and remanded for a new trial.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Substitute Brief of Appellant, together with a virus free disk containing the brief in Microsoft Word 2000, were served, by placing same in the United states Mail, postage prepaid, this _____ day of February, 2004, to: **Robert Brady**, Brown and James, P.C. 1010 Market Street 20th Floor, St. Louis, MO63101-2000.

_____
Robert C. Seibel

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 84.06

I hereby certify that the foregoing Substitute Brief of Appellant comoplies with the limitations contained in Rule 84.06(b) and contains 7,127 words and that the disk filed with this Court, as well as the disks provided to counsel, appropriately labeled and containing the Substitute Brief in Microsoft Word format have been scanned for viruses and are virus free.

_____

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STATE OF MISSOURI)
) ss.
COUNTY OF ST. LOUIS)

Comes now Robert C. Seibel, being duly sworn upon his oath, deposes and states that the facts stated in the foregoing are true and correct to the best of his knowledge, information and belief.

_____

Robert C. Seibel

Subscribed and sworn before me, a Notary Public, this _____ day of February, 2004.

_____

Notary Public

My Commission expires:

APPENDIX

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